

SUPREME COURT OF QUEENSLAND

CITATION: *Anderson v Connelly & Suncorp Metway Insurance Limited*
[2011] QCA 37

PARTIES: **KRISTY MAREE ANDERSON**
(plaintiff/respondent)
v
ALISON CONNELLY
(first defendant/not a party to the appeal)
SUNCORP METWAY INSURANCE LIMITED
ACN 075 695 966
(second defendant/appellant)

FILE NO/S: Appeal No 6628 of 2010
DC No 59 of 2010

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: District Court at Mackay

DELIVERED ON: 8 March 2011

DELIVERED AT: Brisbane

HEARING DATE: 20 October 2010

JUDGES: Margaret McMurdo P and Fraser and White JJA
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. The appeal is allowed with costs;**
2. The judgment sum of \$247,001.16 is set aside and instead substituted with the judgment sum of \$164,667.44.

CATCHWORDS: TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – ACTIONS FOR NEGLIGENCE – APPORTIONMENT OF DAMAGES – INTERSECTION AND JUNCTION ACCIDENTS – where the respondent suffered physical injuries in an accident at a roundabout – where respondent failed to give way to the first defendant's car in the roundabout – where the first defendant failed to indicate her intention to exit the roundabout – where the trial judge overlooked salient features in respect of the respondent's duty of care to a roundabout user in the first defendant's position – whether it is in the interests of justice to set aside the trial judge's apportionment and re-apportion liability

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S

FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE INFERENCES OF FACTS INVOLVED – where the appellant sought to challenge various findings of fact made by the trial judge – whether the trial judge's findings of fact were inconsistent and glaringly improbable – whether the trial judge's findings of fact impugned by the appellant should be overturned

Transport Operations (Road Use Management – Road Rules) Regulation 1999 (Qld) (repealed), s 109, s 110, s 111(1), s 111(3), s 111(4), s 111(5), s 112, s 113, s 113(1), s 113(2), s 113(3)(a), s 114(1), s 117(1), s 118, s 118(1), Sch 6

Anderson v Connelly & Suncorp Metway Insurance Limited, unreported, Pack DCJ, DC No 59 of 2010, 3 June 2010, related

Brunskill v Sovereign Marine & General Insurance Co Ltd (1985) 59 ALJR 842; [1985] HCA 61, cited

Devries v Australian National Railways Commission (1993) 177 CLR 472; [1993] HCA 78, cited

Frost v Ford [1995] QCA 334, considered

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited

Pennington v Norris (1956) 96 CLR 10; [1956] HCA 26, cited

Sibley v Kais (1967) 118 CLR 424; [1967] HCA 43, considered

COUNSEL: G W Diehm SC, with G O'Driscoll, for the appellant
S C Williams, with C Graham and B Hartigan for the respondent

SOLICITORS: Grant & Simpson Lawyers for the appellant
Macrossan & Amiet Solicitors for the respondent

- [1] **MARGARET McMURDO P:** On a fine morning in April 2008 at about 8.40 am, the respondent, Kristy Maree Anderson, a 22 year old bar attendant, was driving her red Kia Rio sedan onto a roundabout in Mackay. Her car collided with the white Hyundai Getz sedan driven by Alison Connelly. Ms Connelly was returning home after dropping off her children at school. Ms Anderson suffered personal injuries and brought a claim against Ms Connelly for damages in negligence. The appellant, Suncorp Metway Insurance Limited, defended the action on Ms Connelly's behalf. The trial took place in the Mackay District Court in May last year. The judge concluded that Ms Connelly was primarily responsible for the collision, although Ms Anderson contributed to it. He apportioned 75 per cent of liability for the accident to Ms Connelly and 25 per cent to Ms Anderson. He gave judgment for Ms Anderson against the appellant in the sum of \$247,001.16 and ordered the appellant to pay Ms Anderson's costs. The appellant appeals, contending the judge ought not to have found Ms Connelly negligent.
- [2] Before turning to the appellant's contentions, I will set out the relevant evidence at trial and the portions of the judge's reasons and findings which are controversial in this appeal.

The relevant evidence in Ms Anderson's case

- [3] Maps and photographs of the roundabout were tendered at trial (exhibit 7 at trial). A useful plan of the roundabout, part of exhibit 7, is contained in Appendix 1 to these reasons. The following matters were common ground. The roundabout had two lanes throughout; four entrances and three exits; and good visibility across it to all exits and entrances. Ms Anderson entered the roundabout from the western entrance on the northern Bruce Highway access road. There were two lanes entering the roundabout from this access road. Travelling clockwise around the roundabout, the next exit and entrance was to and from the Mackay-Bucasia Road. Two lanes exited the roundabout on to the Mackay-Bucasia Road. The next entrance and exit on the eastern side of the roundabout was Malcolmson Street. Ms Connelly was travelling along Malcolmson Street towards the roundabout and entered the roundabout from this entrance. The Malcolmson Street entrance also had two lanes feeding onto the roundabout. The final entrance and exit to the roundabout was to and from the southern Bruce Highway access road.
- [4] Ms Anderson gave the following evidence. At 8.40 am on 28 April 2008, she was driving to work along the northern Bruce Highway access road towards the roundabout. She intended to head straight through the roundabout, exiting at Malcolmson Street. As she approached the roundabout, she was in the left lane. She stopped at the white dotted line before the give way sign at the entrance to the roundabout. There was a car next to her in the right lane.
- [5] She looked onto the roundabout and saw a white vehicle in the inside lane (Ms Connelly's car). Its right indicator was flashing. As it was about a quarter of the way through the roundabout, still in the inside lane with the right indicator flashing, she thought it was safe to enter the roundabout. She continued watching the white car as she entered the roundabout. She then saw the white car straighten, still with its right indicator on. It collided with her driver's side door. At the time of the collision, her car was in the outside lane of the roundabout, just passing the Mackay-Bucasia Road exit. It was possible to exit from both roundabout lanes onto that road. As the white car's right indicator was activated, she reasoned that it was travelling in the same direction as she was. She was surprised when the white car moved to exit onto the Mackay-Bucasia Road, crossing the outside lane in which Ms Anderson was travelling. Had the white car indicated it was turning left off the roundabout onto Mackay-Bucasia Road, she would not have entered the roundabout. At all times after she entered the roundabout prior to the collision, the white car's right indicator was activated.
- [6] When she entered the roundabout, she was in first gear and travelling at about 15 kph. By the time of the collision, she was in second gear. She engaged the clutch and braked prior to impact.
- [7] In cross-examination, she gave the following answers. She agreed that, shortly after the accident, police spoke to her (in her mother's presence) and then to the driver of the white car. When she gave police her version of events, she was in shock. It included the following:
- "A: I was coming from the intersection, there was a car besides me on the inside lane. I couldn't see any cars coming through, so I continued out. Then I saw her car, her car connected about the white line, more to the inside of the line than the roundabout. Her car hit me and my car slid sideways, stopping where it is.

...

Q: How speed were you travelling?

A: I think about 30 or 40 Ks.

Q: How do you know that you were travelling at that speed?

A: Roughly I was coming into the roundabout.

Q: When did you first see the other vehicle?

A: When I was on the roundabout.

Q: Did you see the Give way sign?

A: Yeah, I did stop.

Q: Did you come to a complete stop?

A: I am not sure.

Q: Do you understand your responsibilities at a roundabout?

A: If someone else is on the roundabout I am to wait till it is safe, as well as any one to the right.

Q: Did you apply your brakes at any time?

A: I think I did, I am pretty sure I did.

...

Q: What do you think caused the accident?

A: I don't know." (errors as in original)

- [8] Whilst not disputing that she gave those answers, this was not an accurate account. In fact, she came to a complete stop at the dotted line. She entered the roundabout in first gear and did not exceed 15 kph on the roundabout.
- [9] She obtained the police traffic report a month or two after the accident. On 17 March 2009, with the assistance of her present solicitor, she wrote a letter to the authorities challenging the accuracy of the version she was recorded as having given to police. She disputed that she drove into the path of the white car. She explained that the white car was in the inside lane and indicating that it was travelling in the same direction as she was. She considered the driver of the white car should have activated the left indicator to show the white car was exiting the roundabout at the point of the collision. She also denied both that she entered the roundabout without looking and that she was travelling at about 30 or 40 kph.
- [10] As a result of the accident, she received a traffic infringement notice for failing to give way at a roundabout. This resulted in a fine and a loss of points from her licence.
- [11] Ms Anderson's mother gave the following evidence. Ms Anderson telephoned her shortly after the accident. She lived nearby and arrived at the accident scene within 10 or 15 minutes of Ms Anderson's phone call. Ms Anderson was "very shaken and white" at that time.

The relevant evidence in the appellant's case

- [12] Ms Connelly, a pharmacy assistant, gave evidence that she had entered the roundabout heading towards her home in Bucasia. She was familiar with the roundabout which she used most days during the school term. She had travelled west along Malcolmson Street in the right lane approaching the roundabout. There was a small queue of traffic to enter the roundabout and she was moving slowly. She explained:
- "The left-hand lane has to turn left, the right-hand lane has to turn right, there's no - there's no straight on in that roundabout. So, I was

indicating right until the right-hand and the left-hand lane became clear and then I pulled on into the right-hand lane indicating right and proceeded round to turn onto Mackay-Bucasia Road. After the first exit, [the southern Bruce Highway access road], I indicated left and pulled off into the right-hand lane to move onto Mackay-Bucasia Road.

And you came into a collision with another vehicle?-- Yeah.

Whereabouts in that scenario did that collision occur?-- Just before the exit that I was attempting exit from.

... It was on the roundabout.

... I indicated left after the first exit which is to go south into Mackay city centre [the southern Bruce Highway access road]. I indicated left after that because you can't indicate left before then [or] else you would like you were turning down onto that road, so you - you'd cause an accident. The roundabout's very tight, it's very small on the inside lane, so yeah, as soon I'd passed that first exit in - on the left-hand lane, on the left-hand side, I indicated left, that I was going to start to move off and straightened up to move off."

- [13] In answer to a question from the judge, she explained that initially she activated her right indicator, but after passing the first exit (the southern Bruce Highway access road) she activated her left indicator as she was leaving the roundabout at the next exit. She was travelling very slowly, about 10 kph as it was "very tight on the right-hand lane". Her car allowed her to activate the left indicator even when the steering wheel was in the opposite position; she often did this. She glanced over but did not recall seeing any traffic entering the roundabout in front of her. She "was concentrating on getting off and staying in [her] correct lane". She did not see Ms Anderson's red car until just before the collision.
- [14] After the collision, she spoke to Ms Anderson who was still in her vehicle. "She had a lot of glass and things on her legs". Ms Anderson had to climb into the back seat of her car to get out through the back door. They waited together until police and fire services arrived.
- [15] In cross-examination, she gave the following evidence. At the time of the accident, she held an English driver's licence and had been living in Australia only six weeks. The collision occurred pretty much instantaneously after she saw the red vehicle. After the collision, Ms Anderson's vehicle was quite badly damaged and Ms Anderson was sitting in the driver's seat, covered in glass. Mc Connelly asked her if she was alright, but she did not recall if Ms Anderson responded. She marked the point at which she changed her activation of the right indicator to the left indicator on the photograph (part of ex 7) with the letter "I". This was at a point just before Ms Anderson entered the roundabout.
- [16] She did not tell police that she had indicated twice whilst on the roundabout. She was upset at the time. Her car did not get out of second gear on the roundabout before the collision. She maintained that she activated her left indicator as she approached the Mackay-Bucasia Road exit, shortly before the collision. She agreed that, had she not done so, the right indicator would have misled other drivers on the roundabout who would have expected her to continue around the roundabout.
- [17] Ms Connelly gave the following answers when police asked her what happened:

"I dropped the kids off at North High School and drove down Malcomson Street [sic]. I was in the inside or right hand lane as I approached the roundabout. There was no traffic coming [sic] my right so I continued on through onto the roundabout turning right, I had my indicator on. As I started to straighten up to drive onto Mackay-Bucasia Road a red car came across my path. It seemed to come from no-where. The car has hit left side. I was knocked off line and ended up where I am now.

Q. Where were you looking prior to the incident?

A. I glanced to my left then I looked into the lane I was travelling into.

Q. Could you have done anything to avoid the accident?

A. No.

Q. What do you think caused the accident?

A. I think she pulled out in front without looking."

- [18] The police questioning of both Ms Anderson and Ms Connelly was taken from standard questions police were instructed to ask in these circumstances.

The judge's findings

- [19] After referring to Ms Anderson's evidence, the judge found that she:
 "stopped or just about stopped her vehicle prior to entering the intersection, and that she travelled thereafter no more than approximately 15 metres before the collision."¹
- [20] She was travelling much less than 30 to 40 kph at the time of the collision.²
- [21] Both Ms Anderson and Ms Connelly appeared honest in their recollections.³
- [22] Ms Connelly told police that she activated her right indicator; she did not state that she activated her left indicator as she straightened her vehicle to enter the Mackay-Bucasia Road. The police officer was inexperienced and asked questions from a "pro forma" sheet without specifically enquiring whether Ms Connelly changed indicators. The judge therefore placed "little weight" on Ms Connelly's failure to tell police that she had indicated to turn left off the roundabout.⁴
- [23] The judge continued:
 "I find it difficult to determine the question of whether the left indicator was activated. I have concluded that it is more probable than not that it was not operating primarily upon the basis that whilst [Ms Anderson] did not observe Ms Connolly's [sic] vehicle straightening as early as she might have had she been keeping a better lookout, I think she would have had at least have observed the left indicator operating at some stage before the collision. I conclude therefore that Ms Connolly [sic] is honest but mistaken in that regard."⁵

¹ *Anderson v Connelly & Suncorp Metway Insurance Limited*, unreported, Pack DCJ, DC No 59 of 2010, 3 June 2010, [7].

² Above, [7], [9].

³ Above, [11].

⁴ Above, [14].

⁵ Above, [15].

I think the primary cause of this traffic accident relates to the fact that Ms Connolly's [sic] right indicator remained operating for a longer period than was necessary giving [Ms Anderson] the false impression that she could enter the intersection safely. I find [Ms Connolly's] lookout defective in failing to observe [Ms Anderson] at all until immediately prior to the collision and not indicating an intention to turn into Mackay Bucasia Road. Ms Connolly had the right of way because she was first to enter the roundabout, but she then arguably had the duty to give way to [Ms Anderson's] vehicle because it had entered the outer lane beforehand. (See s. 28.1 of the Traffic Regulations).⁶

...

[Ms Anderson's] lookout was defective in failing to observe [Ms Connolly's] vehicle straighten. If she had done so there may have been a speculative chance she might have been able to avoid the collision by turning left in the outer lane on the Mackay Bucasia Road. I conclude however that the probabilities are that having regard to the lookout of each of the parties neither was realistically in a position to avoid the collision due to the lateness of the observation of one another.⁷

There was an explanation for [Ms Anderson] entering the intersection based on the continuity of the operation of the right indicator.

I conclude that there ought to be an apportionment of liability. I apportion 75% of the responsibility to [Ms Connolly] and 25% to [Ms Anderson]."⁸

The appellant's contentions

- [24] The appellant emphasised that this appeal concerns findings of fact based on inferences which the judge drew from uncontroverted facts. An appeal court, the appellant submitted, is in as good a position as the primary judge to find the correct facts: *Brunskill v Sovereign Marine & General Insurance Co Ltd*.⁹
- [25] The appellant contended that the judge erred in referring to "s 28.1 of the *Traffic Regulations*",¹⁰ a regulation which was not apposite. The relevant traffic regulations were contained in the *Transport Operations (Road Use Management – Road Rules) Regulation 1999* (Qld) (Reprint 4A) (now repealed)¹¹ ("the Regulation"). There was no obligation on a driver on a roundabout to give way to a person entering the roundabout; rather, a driver entering a roundabout must give way to any vehicle in the roundabout: s 114(1) of the Regulation. Further, Ms Anderson's conduct breached s 113 and s 118 of the Regulation. The judge failed to recognise that Ms Anderson had a give way sign where she entered the

⁶ Above, [16].

⁷ Above, [18].

⁸ Above, [19]-[20].

⁹ (1985) 59 ALJR 842, Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ, [10] and [12]; [1985] HCA 61.

¹⁰ *Anderson v Connolly & Suncorp Metway Insurance Limited*, unreported, Pack DCJ, DC No 59 of 2010, 3 June 2010, [16].

¹¹ Repealed by *Transport Operations (Road Use Management – Road Rules) Regulation 2009* (Qld), effective 12 October 2009.

roundabout and so was required to give way to Ms Connelly as Ms Connelly's vehicle entered the roundabout first. Ms Connelly was operating her vehicle in accordance with the relevant Regulation; Ms Anderson was not.

- [26] The appellant challenged the judge's finding that Ms Connelly did not activate her left indicator because, had she done so, Ms Anderson would have seen it.¹² This finding was inconsistent with the judge's finding that Ms Anderson was not keeping a proper lookout and did not see Ms Connelly's vehicle straighten.¹³ The judge should have accepted Ms Connelly's evidence that she activated her left indicator before turning off the roundabout. Ms Connelly was driving in accordance with the Regulation in driving through the roundabout in the inside lane: see s 111(3) of the Regulation. Ms Anderson ought to have known that a vehicle may exit the roundabout in the way attempted by Ms Connelly. Ms Anderson did not see the left indicator activated on Ms Connelly's vehicle because she did not see her vehicle at all before she entered the roundabout. It followed that she was not keeping a proper lookout.
- [27] The judge overlooked that Ms Anderson's version to police shortly after the accident was inconsistent with her evidence at trial in important respects. The judge should have found, consistent with that earlier version, that she did not see Ms Connelly's vehicle until her own vehicle was on the roundabout. She did not tell police that she saw Ms Connelly's right indicator flashing. It would have been difficult for her to have seen Ms Connelly's right indicator. On Ms Anderson's version, she must have drawn beside Ms Connelly's vehicle on the roundabout and passed it in the left lane just before the collision. The judge's factual findings were inconsistent and glaringly improbable.
- [28] The appellant submitted that the judge's findings apportioning fault to Ms Connelly should be set aside. Instead, judgment should be entered in favour of the appellant. Alternatively, if any apportionment of damage is to be attributed to Ms Connelly, it should be much less than 50 per cent.

The respondent's contentions

- [29] The judge's impugned findings of fact can only be overturned if they were inconsistent with facts incontrovertibly established, if they were glaringly improbable; or if the judge failed to use, or palpably misused, his advantage: *Brunskill; Devries v Australian National Railways Commission*.¹⁴
- [30] Any breach by Ms Anderson of the Regulation was not definitive of the question of whether Ms Connelly was negligent in failing to take reasonable care in her treatment of Ms Anderson: see *Sibley v Kais*.¹⁵ In any case, although s 114(1) of the Regulation requires a driver entering a roundabout to give way to any vehicle in the roundabout, Ms Connelly was in breach of s 113(3)(a) and s 118 of the Regulation. With a double lane roundabout like this, even if Ms Connelly's vehicle was in the inside lane of the roundabout when Ms Anderson entered it, Ms Anderson complied with the Regulation by entering the roundabout in the left hand lane which had no vehicles in it.

¹² *Anderson v Connelly & Suncorp Metway Insurance Limited*, unreported, Pack DCJ, DC No 59 of 2010, 3 June 2010, [15].

¹³ Above, [18].

¹⁴ (1993) 177 CLR 472, Brennan, Gaudron, McHugh JJ, 479; [1992] HCA 41.

¹⁵ (1967) 118 CLR 424, Barwick CJ, McTiernan, Kitto, Taylor and Owen JJ, 427; [1967] HCA 43.

- [31] The judge found that Ms Connelly was negligent in activating her right indicator at a time when she was moving to the left to leave the roundabout. This gave Ms Anderson the false impression that she could safely enter the roundabout because Ms Connelly was continuing right around the roundabout. This Court should not interfere with the judge's findings.
- [32] On those findings, the apportionment of liability was unexceptional. It was consistent with the observations of this Court in *Frost v Ford*:¹⁶
- "There is nothing in the judgment of the learned trial judge to suggest that he overlooked what was said in *Sibley v Kais* (1967) 118 CLR 424 at 427:
- "The obligation of each driver of two vehicles approaching an intersection is to take reasonable care. What amounts to 'reasonable care' is, of course, a question of fact but to our mind, generally speaking, reasonable care requires each driver as he approaches the intersection to have his vehicle so far in hand that he can bring his vehicle to a halt or otherwise avoid an impact, should he find another vehicle approaching from his right or from his left in such a fashion that, if both vehicles continue, a collision may reasonably be expected.'
- In *Pennington v Norris* (1956) 96 CLR 10, the High Court of Australia ... observed:
- "It is clear that the Act intends to give a very wide discretion to the judge or jury entrusted with the original task of making the apportionment. Much latitude must be allowed to the original tribunal in arriving at a judgment as to what is just and equitable. It is to be expected, therefore, that cases will be rare in which the apportionment made can be successfully challenged."
- [33] In this case, the respondent contends, the apportionment was not so unreasonable that it cannot be supported on the evidence. The appeal should be dismissed.

Conclusion

The obligations of the parties under the Transport Operations (Road Use Management – Road Rules) Regulation (Reprint No 4A)

- [34] The High Court made clear in *Sibley v Kais* that a breach of traffic regulations does not necessarily correlate with a breach of the duty to take reasonable care. The fact that Ms Anderson has been fined and lost points from her licence for failing to give way at the roundabout is certainly not determinative of the liability question. But it is nevertheless helpful to begin this discussion of the resolution of the grounds of appeal with an understanding of the parties' obligations under the Regulation.
- [35] Part 9 of the Regulation directly concerned roundabouts. It is not in contention that the traffic circle where this collision occurred was a "roundabout" under the Regulation.¹⁷ Ms Anderson and Ms Connelly entered the roundabout from roads with two lines of traffic travelling in the same direction as the driver.¹⁸ Ms Connelly was intending to leave the roundabout more than halfway around it¹⁹

¹⁶ [1995] QCA 334.

¹⁷ See the Regulation, s 109 for the definition of "roundabout".

¹⁸ See the Regulation, s 111(1).

¹⁹ Above, s 110 for the meaning of "halfway around a roundabout".

and so was required to enter the roundabout from the right marked lane or right line of traffic,²⁰ as she did. Ms Anderson was intending to leave the roundabout halfway around it²¹ and so was entitled to enter the roundabout from either the right or left lane of traffic.²² In entering the roundabout from the left lane of the access road (subject to the discussion in the subsequent paragraph), Ms Anderson was not breaching the Regulation. Ms Anderson and Ms Connelly entered the roundabout in accordance with the arrow road markings in the lanes in which they were travelling.²³ As neither Ms Anderson nor Ms Connelly was leaving the roundabout at the first exit, they were not required to give a left change of direction signal when entering the roundabout.²⁴ As Ms Anderson was intending to exit the roundabout halfway around it, she was not required to give a right change of direction signal when entering the roundabout.²⁵ But Ms Connelly, who was exiting the roundabout more than halfway around, was required to give a right change of direction signal when entering the roundabout,²⁶ as she did. She was required to continue to give that signal (indicating right) in the roundabout unless "changing marked lanes, or entering another line of traffic".²⁷

[36] Both drivers were required to give way when entering the roundabout to any vehicle in the roundabout.²⁸ The term "give way" is defined as meaning:

- "(a) if the driver ... is stopped – remain stationary until it is safe to proceed; or
- (b) in any other case – slow down and, if necessary, stop to avoid a collision."²⁹

[37] Both drivers were required to also "give a left change of direction signal before the driver changes marked lanes to the left, or enters...another line of traffic to the left, in the roundabout".³⁰ It is not clear whether this provision applied to Ms Connelly when leaving the roundabout. But, in any case, the Regulation provided that, if practicable, a driver driving in a roundabout must give a left change of direction signal when leaving the roundabout.³¹ There was no evidence that it was not practicable for Ms Connelly to give a signal indicating left as she began to leave the roundabout for the Mackay-Bucasia Road.

[38] The regulation to which the primary judge referred in his reasons at [16] was relevantly as follows:

"28 Starting a left turn from a multi-lane road

- (1) A driver turning left at an intersection from a multi-lane road must approach and enter the intersection from within the left lane unless—
[exceptions not relevant in the present case]."

²⁰ Above, s 111(3).

²¹ Above, s 110.

²² Above, s 111(4).

²³ Above, s 111(5).

²⁴ Above, s 112.

²⁵ Above, s 113.

²⁶ Above, s 113(1) and (2).

²⁷ Above, s 113(3)(a).

²⁸ Above, s 114(1).

²⁹ Above, sch 6.

³⁰ Above, s 117(1).

³¹ Above, s 118(1).

The judge's findings of fact

- [39] Some of the facts which the appellant asks this Court to overturn are primary findings of fact. It follows that this Court will not overturn them unless they are glaringly improbable; or unless the judge, in making them, failed to use, or clearly misused, his advantage in observing the witnesses give their evidence: *Brunskill; Devries*.
- [40] The judge was entitled to accept Ms Anderson's evidence that she stopped, or nearly stopped, before entering the roundabout. This was consistent with her account to police officers immediately after the incident. There was no contrary evidence.
- [41] The judge was entitled to accept Ms Anderson's evidence that she was travelling at much less than 30 to 40 kph at the time of the collision. It is true that she told police she was then travelling at 30 to 40 kph, but she added shortly afterwards, "probably not even that". It seems to me that the judge was reluctant to place reliance on Ms Anderson's statement to police immediately after the collision where it differed from her evidence at trial. When she spoke to police, she was a young person who had been involved in a frightening incident. She had been covered in broken glass, and had to climb into the back seat of her car to get out of it. Her mother described her at about the time of the police interview as looking "very shaken and white". Further, she was only a short way into the intersection when the collision occurred. It was unlikely that she could have reached 30 or 40 kph from a stationary or almost stationary position in a geared car over a distance of only 15 metres or so.
- [42] The judge was entitled to accept Ms Anderson's evidence that she entered the roundabout in the outside lane of the access road.³² The judge accepted that Ms Connelly's vehicle was in the inside lane of the roundabout.³³ These facts did not seem to be challenged and were consistent with Ms Anderson's original account to police. Nor was there any challenge to the judge's finding that Ms Connelly's car was originally travelling in the inside lane of the roundabout at the time Ms Anderson had committed to enter the roundabout.³⁴
- [43] More critical to this appeal is the judge's acceptance of Ms Anderson's evidence that Ms Connelly had her right indicator activated at all times prior to the accident and did not activate her left indicator at all prior to beginning to exit the roundabout immediately before the collision. Ms Anderson did not give this account to the investigating police officer. Indeed, when asked by police what she thought caused the accident, she responded that she did not know. If Ms Anderson had not thought Ms Connelly was veering left to leave the roundabout because Ms Connelly had her right indicator activated, it is curious that she did not tell police that this was a cause of the accident. But, as I have explained, the judge was entitled to consider that Ms Anderson's account to police was unreliable because she was in shock at the time she gave it. Ms Anderson's account at trial was consistent with the letter she wrote correcting the traffic accident report, albeit with the assistance of her solicitor almost a year later. In that letter, Ms Anderson stated that Ms Connelly was travelling around the roundabout and did not activate her left indicator to show she was exiting the roundabout prior to the collision.

³² *Anderson v Connelly & Suncorp Metway Insurance Limited*, unreported, Pack DCJ, DC No 59 of 2010, 3 June 2010, [3].

³³ Above, [11].

³⁴ Above, [11].

- [44] It is true the judge stated he placed "little weight" on the fact that Ms Connelly did not tell police after the accident that she activated her left indicator before exiting. But this omission in Ms Connelly's account to police was, in my view, not without significance. Ms Connelly was apparently a more mature person than the 22 year old Ms Anderson. Though no doubt shaken up by the collision, Ms Connelly was not significantly injured in it, unlike Ms Anderson. Ms Connelly, in her interview with police, appeared confident and assertive. She unequivocally stated her belief that Ms Anderson caused the accident by pulling out in front without looking. Ms Connelly's failure to tell police that she activated her left indicator before leaving the roundabout causes me to doubt her evidence at trial that she did so.
- [45] The judge frankly conceded that he found the question, whether Ms Connelly had activated her left indicator before leaving the roundabout, difficult to determine.³⁵ There were no independent witnesses on this question. The judge reasoned that, had Ms Connelly's left indicator been activated, Ms Anderson was likely to have seen it prior to the collision. The fact that she did not suggested to the judge that the left indicator was not activated. With respect, I find that reasoning circular and unpersuasive. But Ms Anderson's firm evidence that the left indicator was not activated, combined with Ms Connelly's omission to tell police that she activated her left indicator before leaving the roundabout, persuades me that it is more probable than not that the left indicator was not activated. It follows that I agree with the judge's findings of fact on this question.
- [46] In my view, none of the judge's primary findings of fact impugned by the appellant should be overturned. It follows from those factual findings that a cause of the collision resulting in Ms Anderson's injuries was Ms Connelly leaving her right indicator activated whilst exiting the roundabout to the left at the Mackay-Bucasia Road from the inside lane. Further, as the primary judge recognised, in not observing that, when she left the roundabout in this way, she was cutting across Ms Anderson's path of travel, Ms Connelly was not keeping a proper lookout.³⁶
- [47] Roundabouts are notoriously problematic for road users. They require drivers using them to take particular caution to look out for other road users entering, exiting or changing lanes on the roundabout. Drivers may panic or become confused in leaving or changing lanes on roundabouts. Drivers may undertake these manoeuvres with little or no use of indicators. This may be because indicators sometimes do not operate satisfactorily when the vehicle is travelling through the traffic circle in the opposite direction to that intended to be indicated. Both Ms Anderson and Ms Connelly should have been taking particular care when travelling on this roundabout to look out for others on the roundabout, relevantly each other.
- [48] The judge found that Ms Anderson had travelled only about 15 metres on the roundabout before the collision.³⁷ That finding is not challenged. Having just entered the roundabout, Ms Anderson was required to give way to vehicles in the roundabout, including Ms Connelly's vehicle. Even accepting Ms Anderson's evidence that Ms Connelly's vehicle was in the inside lane, she should have foreseen the real possibility that Ms Connelly's car, although indicating right, could take the next exit on the Mackay-Bucasia Road. The lane markings on the roundabout³⁸

³⁵ Above, [15].

³⁶ *Anderson v Connelly & Suncorp Metway Insurance Limited*, unreported, Pack DCJ, DC No 59 of 2010, 3 June 2010, [16].

³⁷ Above, [7].

³⁸ See Appendix 1 to these reasons.

indicated that it was possible for Ms Connelly to take this exit by crossing, rather than directly changing into the outside lane of the roundabout, although only if safe to do so. I accept the judge's finding that Ms Anderson was misled into thinking that Ms Connelly was not taking the Mackay-Bucasia Road exit because Ms Connelly's car had its right indicator activated. But even so, in entering the roundabout, Ms Anderson was obliged to give way to other vehicles on the roundabout and was required to take particular care in respect of Ms Connelly's car. She should have been alert to and travelling slowly enough to prepare for the contingency that Ms Connelly's car may leave the roundabout at the Mackay-Bucasia Road exit from the inside lane of the roundabout.

[49] In those circumstances, I consider the primary judge erred in those circumstances in apportioning such a high percentage of liability for the collision to Ms Connelly. Ms Anderson's percentage of liability for the accident was considerably more than the 25 per cent apportioned to her. Whilst appellate courts are reluctant to interfere with such apportionments which involve discretionary considerations in the context of an appropriate range,³⁹ it is unjust and inequitable to apportion 75 per cent of the responsibility for this accident to Ms Connelly. The primary judge clearly overlooked salient features in respect of Ms Anderson's duty of care to a roundabout user in Ms Connelly's position. The interests of justice require that this Court allow the appeal, set aside the judge's apportionment, and re-apportion liability.

[50] Ms Anderson entered the roundabout when Ms Connelly's vehicle was travelling on the roundabout in the inside lane. The collision occurred very soon afterwards. Although Ms Connelly's vehicle was indicating that it was proceeding to the right, Ms Anderson should have taken particular care in entering the outside lane of this roundabout, whilst there was a car in the inside lane, to watch for the possibility that the car in the inside lane might leave the roundabout at the next exit, despite indicating the contrary. Indicators can be inaccurate on roundabouts. On the other hand, Ms Connelly, in taking the Mackay-Bucasia Road exit from the inside lane of the roundabout with her right indicator activated, made it difficult for Ms Anderson to anticipate her path of travel. As Ms Connelly was crossing over the outside lane to leave the roundabout, she should have taken particular care to ensure that no car had entered the roundabout at the entrance she had just passed. Had she been keeping a proper lookout, she would have been aware of Ms Anderson's vehicle. And, of course, she should have activated her left indicator. In these circumstances, I consider that both Ms Anderson and Ms Connelly were equally responsible for the collision which resulted in Ms Anderson's injuries. I would apportion liability to each of them at 50 per cent and vary the judgment sum in favour of Ms Anderson accordingly.

ORDERS:

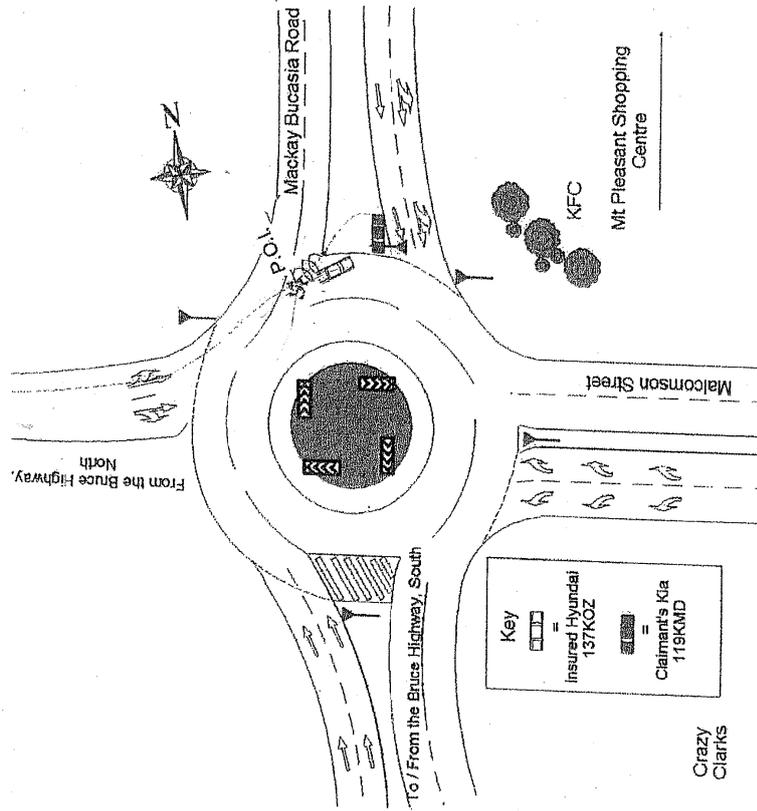
I would allow the appeal with costs; set aside the judgment sum of \$247,001.16 and instead substitute the judgment sum of \$164,667.44.

[51] **FRASER JA:** I have had the advantage of reading the reasons for judgment of the President. I agree with those reasons and with the orders proposed by her Honour.

[52] **WHITE JA:** I have had the advantage of reading the reasons for judgment of the President and agree for those reasons that the appeal should be allowed and the orders made as proposed by the President.

³⁹ See *House v The King* (1936) 55 CLR 499; [1936] HCA 40; *Pennington v Norris* (1956) 96 CLR 10, 15-16; [1956] HCA 20; *Frost v Ford* [1995] QCA 334.

APPENDIX 1



SKETCH-PLAN OF SCENE - (not to scale)